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COURT OF CRIMINAL APPEALS
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**PD-0703-20**

IN THE
COURT OF CRIMINAL APPEALS

FILED
COURT OF CRIMINAL APPEALS
6/29/2021
DEANA WILLIAMSON, CLERK

**The State of Texas,**

**Petitioner,**

**v.**

**Jessie Lee Brooks, Jr,**

**Respondent**

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# PETITION FOR DISCRETIONARY REVIEW

# STATE'S SUPPLEMENTAL BRIEF

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Appeal from the Third Court of Appeals, Cause No. 03-18-00759-CR, and the 20th Judicial District Court, Milam County, Texas Trial Court Cause No. CR 25,688, Honorable John Youngblood

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## IDENTITY OF PARTIES AND COUNSEL

The following constitutes a list of all parties to the trial court's final judgment and the names and addresses of all trial and appellate counsel:

| | |
|---|---|
| Petitioner | State of Texas |
| Petitioner's Trial Counsel | Tony "Brian" Price<br>Milam County District Attorney's Office<br>204 N Central<br>Cameron, Texas 76520<br>254-697-7013<br>daoffice@milamcounty.net |
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## STATEMENT OF THE CASE

Defendant was indicted for Assault Impeding Breath of a Family Member and Aggravated Assault with a Deadly Weapon. The State proceeded with the two cases under separate cause numbers. C.R. Vol. 1 P. 5. A jury acquitted defendant of Assault Impeding Breath of a Family Member but found defendant guilty of Aggravated Assault with a Deadly Weapon. R.R. Vol. 5 P. 139. Defendant was sentenced to thirty years confinement in TDCJ Institutional Division by the Trial Court. C.R. Vol. 1 P. 118. Defendant appealed the conviction to the Third Court of Appeals.

The Third Court of Appeals considered the appeal and ruled that a non-verbal threat would constitute a "distinguishable discrete act" that would separately violate the assault statute and therefore, even though not an element of the offense, the hypothetically correct jury charge requires proof of a verbal threat. Slip Op. at 11. The Court of Appeals then determined that there was legally insufficient evidence to uphold the conviction finding there was insufficient evidence to show the phrase "I need to hit" was not sufficient to show a verbal threat. Slip Op. at 11. The Third Court of Appeals further found that the judgment could not be reformed to a lesser included charge, again finding no verbal threat was made. Slip Op. at 17. Due to these findings the Third Court of Appeals declined to address the constitutionality of the court costs. Slip Op. at 17.

It is from this ruling that petitioner seeks review from this Court.

## STATEMENT OF PROCEDURAL HISTORY

The Third Court of Appeals filed an order reversing the trial court and rendering acquittal on July 3, 2020. No motion for rehearing was filed. Petition for Discretionary Review was granted on November 11, 2020 on the question. The Court has requested this supplemental brief to resolve the question "does the statement 'I need to hit,' that the victim said that Appellant told her, constitute a verbal threat."

## STATEMENT REGARDING ORAL ARGUMENT

There will be no oral argument in this case as per the Order granting discretionary review.

## ISSUE PRESENTED

I. Does the statement "I need to hit," that the victim said that Appellant told her, constitute a verbal threat?

## ARGUMENT AND AUTHORITIES

### I. Background

The victim in this case lived with the Defendant in a house in Cameron. R.R. Vol. 4 P. 57. On the date of the incident, the Defendant locked the victim out of that house. R.R. Vol. 4 P. 57. After defendant initially locked the victim out of the house, the Defendant confronted victim when she attempted to enter the house. R.R. Vol. 4 P. 57. During this confrontation, Defendant first grabbed the victim's neck and then started hitting the victim with a board. R.R. Vol. 4 P. 57. The victim told the defendant he was hurting her, to which defendant responded with the statement "I need to hit" and proceeded again to hit her across her fingers with a board until they started to bleed. R.R. Vol. 4 P. 57. The victim then went to the emergency room in Rockdale, Texas to treat her injuries. R.R. Vol. 4 P. 58. The victim stated she drove to the Rockdale Hospital to be safe from him after the incident. R.R. Vol. 4 P. 166. The treating physician noted that the victim had injuries consistent with her description of the incident. R.R. Vol. 4 P. 131-32. The following day the victim filed a written statement with the Milam County Sheriff's Office. R.R. Vol. 4 P. 57.

### II. The statement "I need to hit," when viewed in context, is a verbal threat.

Threats cannot be viewed in a vacuum. Without contextual words, actions, and conduct a threat cannot harbor the apprehension intended. When looking at the

statement "I need to hit" in the context provided in this case, the statement constitutes a verbal threat.

**A. Standard of Review**

Legal sufficiency is determined by the standard set forth in *Jackson v. Virginia. Brooks v. State*, 323 S.W.3d 893, 912 (Tex. Crim. App. 2010). This standard requires the Court view the evidence in the light most favorable to uphold the verdict and determine if *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 319 (1979) (emphasis in original).

**B. What Constitutes a Threat?**

Determining whether the statement "I need to hit" constitutes a verbal threat, the first question to ask is how is threat defined. In *Olivas v. State*, the Appellant had been convicted of a terroristic threat. *Olivas v. State*, 203 S.W.3d 341, 342 (Tex. Crim. App. 2006). The Court found the matter in *Olivas* turned on whether a threat must be perceived to constitute a threat. *Id.* at 345. The Court, in determining whether the victim had to perceive the threat at the time of the threat, looked to the definition of threat. *Id.* The Court in *Olivas* noted that Webster's dictionary provided four definitions for the term threat. A threat is (1) to declare an intention of hurting or punishing, to make threats against; (2) to be a menacing indication of (something dangerous, evil, etc.), as the clouds threaten rain or a storm; (3) To express intention to inflict (injury, retaliation, etc.); or (4) To be a source of danger, harm, etc. to. *Id.*

The Court found that each definition implied that a threat need not be perceived to be a threat. *Id.* at 346.

Combining all these definitions into a single thought, a threat is the declaration or menacing indication, expressing an intention to inflict injury, retaliation, etc., essentially indicating that the victim is in danger of being hurt by the person making the threat. To be a criminal assault by threat then requires that a person, either through words or actions or a combination of the two, declares or expresses (such as by a menacing indication) an intention to inflict injury, hurting, punishment, or retaliation, and does so with the intent to place another in fear of imminent bodily injury. *See* Tex. Penal Code § 22.02.

### C. The Statement "I need to hit" When Viewed in Context is A Threat.

Like most statements, "I need to hit" when viewed in a vacuum does not have a clear meaning. When a baseball player is talking about their batting average, "I need to hit" is a completely innocent statement. But when a defendant is told by a victim that the defendant is hurting them as the defendant hits the victim with a 2X4 board, the response "I need to hit" is a threatening statement aimed at that victim.

Context matters in determining intention of statements. Courts regularly use contextual clues to interpret the words contained in statutes. *See Tenorio v. State*, 299 S.W.3d 461, 463 (Tex. App. – Amarillo 2009, pet. denied) ("But, we are prohibited from plucking words from the statute and reading them in a vacuum. Rather,

authority obligates us to read and interpret the statute as a whole."). Likewise, juries are instructed that they may make reasonable inferences based on acts, words, and conduct when determining whether a defendant is guilty or not guilty. *See Hart v. State*, 89 S.W.3d 61, 64 (Tex. Crim. App. 2002) (applying inferences based on acts, words, and conduct to the mens rea of the alleged crime). Rarely is a verbal threat solely verbal. Therefore, even when the assault alleged is by verbal threat, a rational trier of fact should consider the acts, words, and conduct surrounding the statement to determine whether the statement declares or expresses (such as by a menacing indication) an intention to inflict injury, hurting, punishment, or retaliation, and does so with the intent to place another in fear of imminent bodily injury.

In *Moore v. State*, the Defendant was convicted of retaliation and contended that the evidence was legally and factually insufficient to support his conviction. *Moore v. State*, 143 S.W.3d 305, 309 (Tex. App. – Waco 2004, pet. ref'd). Specifically, the Defendant contended the evidence was insufficient to establish (1) that he threatened harm to the victim; (2) that he acted with the requisite intent or knowledge; or (3) that the victim was acting as a public servant. *Id.* at 310. The Court recognized that a jury may infer intent or knowledge from the acts, words, and conduct of the accused. *Id.* citing *Hart v. State*, 89 S.W.3d 61, 64 (Tex. Crim. App. 2002). The Court explained the evidence presented in the case showed an initial scuffle that led to the Defendant being physically escorted from the building and the Defendant made a parting statement that he would "get" the victim. *Id.* at 310-11. The Court held that based on

the testimony of the surrounding actions and conduct, the statement by the Defendant that he would "get" the victim after release from jail was sufficient for a rational trier of fact to infer that the Defendant threatened to harm the victim and did so intentionally or knowingly. *Id.*

In this case, there are also actions, conduct, and words that a jury could use to reasonably infer the Defendant was guilty of the aggravated assault by threat. Here, the Defendant confronted the victim, grabbing the victim by the neck and hitting the victim with a 2X4 board. R.R. Vol. 4 P. 57. As the Defendant hit her, the victim told the Defendant the Defendant was hurting her. R.R. Vol. 4 P. 57. The Defendant responded to that statement with this key phrase "I need to hit." R.R. Vol. 4 P. 57. The Defendant then continued to hit the victim with the 2X4 until her fingers began to bleed. R.R. Vol. 4 P. 57. The entire confrontation surrounding the statement "I need to hit" shows the statement declared an intention to inflict injury. Thus, the statement "I need to hit" was a threat.

Further, this same context indicates that this threat was designed to place the victim in fear of imminent bodily injury. The method, the deadly weapon, was already at hand in the form of a 2X4. R.R. Vol. 4 P. 57. The Defendant had already caused the victim some bodily injury; some pain. R.R. Vol 4 P. 57. And the Defendant followed up on the threat by continuing to hit the victim with the 2X4 until her fingers bled. R.R. Vol. 4 P. 57. Therefore, there is evidence sufficient that a rational

juror may conclude that the elements for aggravated assault with a deadly weapon by verbal threat.

### III. Conclusion

Under the *Jackson v. Virginia* standard, a rational trier of fact could conclude that the statement "I need to hit" was a threat. The jury making reasonable inferences from the surrounding acts, words, and conduct of the accused found the Defendant intended the statement to declare an intention to inflict injury. Thus, the statement "I need to hit" was a verbal threat. Therefore, the Court should uphold the conviction of the Jury in this case and remand for further proceedings in accordance with this Court's ruling.

## PRAYER

WHEREFORE, PREMISES CONSIDERED, State prays that the Court REVERSE the Court of Appeals Decision, AFFIRM the conviction from the trial court, and REMAND with instructions for further proceedings in line with this Court's decision.

Respectfully submitted,

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ATTORNEY FOR STATE

## CERTIFICATE OF COMPLIANCE

I hereby certify that, pursuant to Rule 9.4(i) of the Texas Rules of Appellate Procedure, Appellee's Brief contains 1,500 words, exclusive of the caption, identification of parties, statement regarding oral argument, table of content, index of authorities, statement of the case, statement of issues presented, procedural history, signature, proof of service, certification, certificate of compliance, and appendix.

Kyle Nuttall

## CERTIFICATE OF SERVICE

I certify that on June 29, 2021, a true and correct copy of Appellee's Brief is being or will be forwarded to Appellant's counsel by courtesy efile service to sharon@diazwright.com.

Kyle Nuttall

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